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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

H029398

Plaintiff and Respondent,

(Santa Clara County
Superior Court
No. FF408335)

v.

CEFERINO CURENIO,

Defendant and Appellant.

Defendant Ceferino Curenio was charged by felony complaint with one count of second degree burglary (Pen. Code, §§ 459-460, subd. (b)), one count of petty theft (Pen. Code, § 666), and two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).¹ On March 17, 2005, defendant pleaded no contest to the second degree burglary charge and admitted the prior prison terms. On August 29, 2005, the court sentenced defendant to four years in state prison. Pursuant to defendant's plea agreement, the court suspended execution of the prison sentence and ordered defendant to serve one year in county jail as a condition of probation. The court also ordered defendant to pay restitution fines pursuant to sections 1202.4 and 1202.45, a court security fee, and attorney fees pursuant to section 987.8. Defendant appeals the order to pay attorney fees, and we strike the order.

¹ All further statutory references are to the Penal Code unless otherwise noted.

I. Factual Background

On October 5, 2004, Gilroy police officers responded to a theft reported at a Target store.² Through the store's surveillance cameras, one of Target's security officers observed defendant open two packages of cellular phones with a box cutter. Defendant placed the phones in his pocket. Defendant then walked to the sporting goods area, opened the packaging for a knife, and pocketed the knife. Defendant exited the store without paying for the merchandise. Gilroy police arrested and searched defendant, recovering the knife and cellular phones.

II. Discussion

Defendant contends that there is insufficient evidence to support the court's order directing him to pay up to \$500 in attorney fees pursuant to Penal Code section 987.8. We agree.

An order to reimburse the county for attorney fees is not mandatory under section 987.8, and a determination that defendant has the ability to pay is a prerequisite for entry of such an order. (§ 987.8, subd. (e).) Section 987.8 provides, in relevant part, that "the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost" of legal assistance provided through "the public defender or private counsel appointed by the court." (§ 987.8, subd. (b).) A finding of present ability to pay may be explicit or implicit, provided it is supported by substantial evidence. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71; *People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.) "Under the substantial evidence rule, a reviewing court will defer to a trial court's factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found." (*People v. Butler* (2003) 31 Cal.4th 1119, 1127.)

² Due to defendant's no contest plea, the facts are taken from the probation officer's report.

We address first the People's argument that the trial court did not actually determine defendant's ability to pay and, therefore, did not order attorney fees. The People contend that because the trial court referred defendant to the Department of Revenue for a determination of his ability to pay, "[defendant's] next step was to have this matter reviewed with an official at the County Department of Revenue who would report back to the court." Thus, the People's argument implies, the court did not order attorney fees and committed no error. We disagree with this analysis.

At the sentencing hearing, the court referred defendant "to the Department of Revenue for a determination of his ability to pay fines and fees." The court then imposed several fines and fees unrelated to section 987.8 before ordering "attorneys fees not to exceed \$500." No mention was made of the Department of Revenue reporting back to the court prior to imposition of an attorney fees order, and the sentencing minute order references \$500 in attorney fees.

Although the court may have intended to condition the precise amount of the fee on the Department of Revenue's subsequent determination of defendant's ability to pay, it is clear that the court ordered defendant to pay some fee pursuant to section 987.8. Moreover, no provision was made for the Department of Revenue to report back to the court prior to a final determination of the issue. Under section 987.8, only the court may "make a determination" regarding a defendant's ability to pay. (See § 987.8, subd. (b).) The Department of Revenue's role, if any, is only to inquire into the defendant's ability to pay: "The court may, in its discretion, order the defendant to appear before a county officer designated by the court *to make an inquiry* into the ability of the defendant to pay all or a portion of the legal assistance provided." (*Id.*, emphasis added; cf. *People v. Statum* (2002) 28 Cal.4th 682, 689-690 [if the statutory language is clear and unambiguous, then the plain language of the statute establishes its meaning and the legislative intent].) As the trial court's determination of the defendant's ability to pay is a prerequisite to an attorney fees order, and we find such an order was made, we must consider whether there is sufficient evidence to support an implied finding by the court of defendant's ability to pay.

Section 987.8 defines “[a]bility to pay” as a defendant’s “overall” financial capability to pay and lists factors relevant to this determination: (1) the defendant’s “present financial position”; (2) the defendant’s “reasonably discernible future financial position” during the six months following the ability-to-pay hearing; (3) the likelihood of employment during that period; and (4) any other facts relevant to the defendant’s “financial capability.” (§ 987.8, subd. (g)(2)(A)-(D).)

Prior to the court’s order at the sentencing hearing, it heard no evidence related to defendant’s employment or financial status. The probation officer’s report does not include any analysis regarding defendant’s ability to pay and does not recommend attorney fees, but simply notes, “Attorney fees if appropriate.” The evidence that is in the record relating to defendant’s financial capabilities suggests that defendant lacked the present ability to pay any fees. According to the probation officer’s report, defendant was homeless prior to his arrest and has only an eighth grade education. He is not married and his four children live with his brother-in-law, their legal guardian. Prior to his arrest, defendant worked for a temporary employment agency earning about \$8.70 per hour, but was last employed in 2004. There is no indication defendant has future employment plans or opportunities. Defendant also has health problems which could impact his ability to work, including asthma, high blood pressure, Hepatitis C, arthritis, and daily Methadone treatment to combat his heroin addiction. Finally, the court ordered defendant to serve a year in county jail as a condition of probation, limiting greatly his financial opportunities through the relevant six month period.

The People point to the fact that defendant posted a \$10,000 bond during the criminal proceedings as evidence of his ability to pay. There is, however, no support in the record for the assumption that defendant paid the bail bond himself. The fact that someone paid a bail bond on defendant’s behalf does not constitute compelling evidence of defendant’s ability to pay \$500 in attorney fees.

We conclude there is insufficient evidence of defendant’s present ability to pay attorney fees. Due to defendant’s financial circumstances and the modest amount of

fees involved, remanding this matter for further judicial proceedings is likely to result only in additional expense. In the interests of judicial efficiency and economy, we strike the order directing defendant to pay attorney fees.

III. Disposition

The order directing defendant to pay attorney fees pursuant to Penal Code section 987.8 is hereby stricken.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

McAdams, J.